

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
 OFFICE OF THE SECRETARY

In the matter of )  
 )  
 Amendment of the Commission's Rules )  
 Regarding Installment Payment Financing )  
 for Personal Communications Services )  
 (PCS) Licenses )

WT Docket 97-82

To: The Commission

**Comments of TeleCorp PCS, Inc. and Tritel Communications, Inc.**

On June 7, 2000, the Commission issued a *Further Notice of Proposed Rulemaking* in the captioned proceeding ("*Further Notice*").<sup>1/</sup> Therein, it sought comment on several matters regarding the re-auction of certain Personal Communication Services ("PCS") licenses now scheduled for November 29, 2000. By this submission, TeleCorp PCS, Inc. ("TeleCorp") and Tritel Communications, Inc. ("Tritel") (collectively, "TeleCorp/Tritel") submit comments in response to the *Further Notice*.

**I. Summary Statement of Position**

The Commission has already crafted rules governing eligibility for licensing of C and F Block PCS facilities. Since the promulgation of those rules, the industry has undergone considerable expansion but there have been no fundamental changes in the industry that warrant revisiting of these carefully crafted rules.

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<sup>1/</sup> *Further Notice of Proposed Rulemaking*, \_\_\_ FCC Rcd \_\_\_, FCC 00-197 (June 7, 2000).

Notwithstanding the above, TeleCorp/Tritel is cognizant of the Commission's desire to reach a compromise arrangement between small businesses and rural telephone companies ("Entrepreneurs") who have an existing entitlement to apply for the subject frequencies and larger carriers who claim that they have a need for additional spectrum. In this context, TeleCorp/Tritel has reviewed carefully the Commission's compromise proposal set forth in the *Further Notice* and do not take issue with it, with limited exceptions set forth herein.

Because four years have passed since the initial C Block auction, clarification, but not modification, is required with respect to the established grandfathering rights that have been codified and reaffirmed on multiple occasions by the Commission. Specifically, TeleCorp/Tritel submits that the Commission should clarify that it will take a practical approach in defining the "entity" that participated in either Auction No. 5 (the first C Block auction) or Auction No. 10 (the 1996 C Block re-auction), which participation triggers grandfathering rights. Specifically, whereas affiliates of both TeleCorp and Tritel participated in those initial auctions, TeleCorp/Tritel submits that it would serve no useful purpose to require Entrepreneurs to utilize those particular initial auction vehicles, which for the most part have been effectively abandoned by this time. Rather, the Commission should take the pragmatic approach of permitting any entity that is "substantially the same" as the prior auction participant to have grandfathering rights based upon its participation in Auction No. 5 or Auction No. 10. This clarification would serve the public interest by facilitating participation in the re-auction by greater numbers of entities and avoiding small businesses from having to undertake substantial and unnecessary actions to participate in the re-auction. Moreover, it would be wholly consistent with prior Commission pronouncements that it does not want to stifle

“normal growth” of Entrepreneurs, it is only such “normal growth” that causes the grandfathering issue to be crucial to TeleCorp/Tritel.

The *Further Notice* also invited comment on the issue of whether or not existing Entrepreneurial safeguards for existing licensees can be abandoned prematurely, i.e., ahead of the established time frame, in the event that the systems at issue have been built out to meet the initial construction obligations. Whereas neither TeleCorp nor Tritel believes there is any need to alter the existing rules at this time, and both are fully prepared to adhere to their commitment to comply with those rules, TeleCorp/Tritel takes no issue with the Commission clarifying that its designated entity rules can be waived upon request of the qualified control group members, provided that some construction benchmark has been reached. In this regard, it must be stressed that the TeleCorp/Tritel concern is that well-intended relaxation of the rules could have the collateral effect of inciting whole transfers instigated by non-qualified entities. It is in this context that the waiver process should be triggered only by the qualified Entrepreneurial entities involved in the licensee.

With respect to bidding credits for spectrum open to bid by all parties, TeleCorp/Tritel submits that, should this spectrum be removed from that which has been reserved solely for Entrepreneurs, and if Entrepreneurs are intended to have any genuine opportunity to participate in this spectrum, a substantial increase in bidding credits is necessary. TeleCorp/Tritel submits that the Commission was correct in 1994 when it explained that bidding credits in the range of sixty-to-seventy percent would be necessary in the event that the spectrum at issue is open to bidding by all

parties.<sup>2/</sup> At the very least, an increase up to the forty percent level contemplated in the *Further Notice* would appear to be necessary.

## **II. Comments on Specific Commission Proposals**

### **A. Redeployment of Spectrum**

#### **1. The C Block Reconfiguration**

As TeleCorp/Tritel has previously advised the Commission, no party has provided any justification for abandonment of the Commission's separate eligibility rules for the C and F Block spectrum subject to re-auction.<sup>3/</sup> Indeed, the failings of the two primary arguments proffered to support abandonment of Entrepreneurial protections best illustrate the bankrupt nature of such arguments. The most heralded argument is that the trend towards more nationwide coverage somehow eliminates any opportunities for small carriers. There is no truth to the theme that, because there are several nationwide carriers, only nationwide carriers can survive. Witness the successful offering of Leap Wireless International, Inc. ("Leap"). In any event, the TeleCorp/Tritel experience demonstrates the critical role that small carriers can play in nationwide deployment. Equally flawed is the argument that small carriers cannot compete in large markets. That argument is not only unfounded, it is "backwards" in that the most difficult places in which to compete are rural, sparsely populated markets, where TeleCorp and Tritel already operate, not the population-dense markets for

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<sup>2/</sup> *Fifth Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 5532, 5675 (1994).

<sup>3/</sup> In contrast, TeleCorp/Tritel and several other businesses have explained persuasively the major contributions of small business PCS operators. Rather than re-present those arguments here, the reader's attention is directed to the comments filed by TeleCorp/Tritel in DA 00-191.

which PCS was created. This is especially so since recent meaningful reductions in equipment prices serve to offset significantly the advantages of incumbency.<sup>4/</sup>

Both clear Congressional mandates and longstanding, well reasoned FCC auction rules that are dedicated to serving the public interest require that the Commission maintain its established separate eligibility rules for Entrepreneurs in all markets.<sup>5/</sup> Accordingly, TeleCorp/Tritel submits that the Commission should maintain in place its existing eligibility rules. In the alternative, if the Commission determines that the record supports a change to the existing auction rules with respect to the spectrum to be auctioned in Auction No. 35, TeleCorp/Tritel submits that the Commission adopt its proposal set forth in the *Further Notice*. The most fundamental, and necessary, component of that proposal is the continuation of Entrepreneurial eligibility limitations in all markets.

Throughout the first half of this year, there has been considerable discussion regarding the propriety of continuing to reserve spectrum for Entrepreneurs. TeleCorp/Tritel submits that, when this issue is viewed in proper perspective, there can be no genuine controversy over this matter. When the Commission was directed to allocate additional spectrum for PCS and was authorized to license that spectrum via auction, it was directed by Congress to provide meaningful opportunities for small businesses (here Entrepreneurs) to participate. After considerable reflection, the Commission determined that of the 120 MHz of spectrum to be allocated, a mere 40 MHz would

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<sup>4/</sup> At a Donaldson, Lufkin and Jenrette conference in New York City, a spokesperson for a major carrier stated that its churn rate in New York is approximately four percent per month. This phenomenon unquestionably creates opportunities for new licensees.

<sup>5/</sup> The Commission's often-stated desire to maintain the integrity of its auction rules provides an additional, independent reason to do so.

have restricted eligibility. In so ruling, the Commission properly acknowledged that without such reserve status, there would be no meaningful opportunity for participation by small businesses.<sup>6/</sup>

The major carriers promptly (and properly) acquired the 80 MHz of spectrum allocated and open for them. While different persons may reflect differently on the results of the auctions in which that spectrum was assigned, there are two unassailable facts. First, the spectrum was licensed to a small group of carriers, virtually all of whom had a considerable prior presence in wireless either directly or through affiliates. Second, the prices that those carriers paid for the spectrum were considerably less than that paid by Entrepreneurs in any of the C Block auctions, and are far less than the market value of the spectrum today. Now that the large carriers have digested their initial PCS spectrum acquisitions, they not surprisingly want more. Grant of additional spectrum would be the least expensive, but certainly not the only way, to increase capacity.

The Commission in recent years has given considerable deference to “market forces” in allocating spectrum. Whereas TeleCorp/ Tritel applauds that theory generally, that too needs to be put into perspective. First, the Commission has already considered and rejected the idea that small businesses could compete significantly with the nation’s largest carriers bidding for spectrum,<sup>7/</sup> and nothing has transpired to change that. Moreover, in assessing the likelihood of market forces providing all players with any reasonable opportunity to succeed, the Commission must consider all

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<sup>6/</sup> *Fifth Report and Order*, PP Docket 93-253, 9 FCC Rcd 5532, 5675 (1994) (“*Fifth Report and Order*”).

<sup>7/</sup> *See* n. 5, *supra*. One change that has transpired over the course of PCS operations is that the largest of the nation’s carriers have become much, much larger. This makes any genuine competition by small carriers a theoretical point only.

facets of the spectrum at issue. It must determine whether the spectrum has a recognized utility. Here PCS spectrum unquestionably has such utility. In contrast, only where far less developed spectrum is concerned, such as LMDS, WCS and 220 MHz, has the Commission successfully licensed spectrum to both small and large entities without there being any set aside for small businesses.

There is one other matter that warrants mentioning in order to provide proper perspective here. Many of the nation's largest wireless carriers that are now decrying separate eligibility have already reaped the benefits of special allocation of spectrum. Regional Bell Operating Companies and their affiliates were able to obtain much of their wireless spectrum for "free", and on an effectively guaranteed basis, by virtue of the wireline set aside for cellular. They are now able to leverage that no-cost spectrum with other spectrum that they may acquire in the future. Others obtained PCS spectrum at very low prices, as explained above, by virtue of their being no genuine competition at the Commission's A/ B Block auction. Still others obtained their initial presence in wireless through special waiver.<sup>8/</sup> Finally, to the extent that there are acquisitions outside of the conducted FCC auctions in which small carriers have been able to win in formal bidding wars, such as the recent Quest acquisition of US West, it bears noting that those types of acquisitions were not undertaken in a regulatory vacuum. Rather, elaborate rules protecting Competitive Local Exchange Carrier rights, access charges, and other matters, unquestionably played a significant role in that

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<sup>8/</sup> Nextel Communications, Inc., for instance, was virtually born out of waiver. TeleCorp/Tritel does not take issue with such licensing arrangement. It does, however, urge the Commission to take that into consideration when analyzing the instant proposals of the parties.

acquisition (as they should have). It is against this backdrop that the comments of many of the largest carriers appear to be utterly self-serving.

**2. Entrepreneurs are Fulfilling Necessary and Appropriate Licensee Responsibilities.**

One of the ironies of the re-auction process is that Entrepreneurs are being subjected to inappropriate and invalid criticism, and their many unique contributions are not being fully recognized. For instance, only a handful of Entrepreneurs were involved in the bankruptcies about which so much has been said. Moreover, even assuming that far more licensees were involved, insufficient attention has been directed to the fact that the essential ingredient in those asserted license defaults was the Commission's well-intended, but ill-fated, installment payment program that has now been eliminated. Thus, there is no valid reason to believe that Entrepreneurs will not perform well in future auctions, just as they did in Auction No. 22.

The unique benefits that Entrepreneurs have contributed have also gone under-recognized. Unlike large carriers who have, for the most part, focused on the most profitable, population-dense markets, Entrepreneurs have devoted considerable attention to rural and medium-sized markets. TeleCorp/Tritel provides service to such markets now, and this is the preeminent component of their overall operating strategy. Similarly, Leap also provides service to medium-sized markets. As such, Entrepreneurs are fulfilling the goal of recent Telecom Act amendments to extend service to those who otherwise may be without it. *See Further Notice*, para. 5, where the Commission reiterated that service to rural areas and the avoidance of licensee concentration are two of its primary Congressional mandates.



Many of the more successful, financially more secure Entrepreneurs, such as TeleCorp/Tritel, are often criticized, either directly or indirectly, because they do not “look” like the Entrepreneurs that the Commission at one time contemplated. Yet, to the extent that their size is the basis for such criticism, these licensees are success stories that have grown naturally and through processes endorsed by the Commission’s rules, and have “become the strong competitors” that the Commission has sought. (*Further Notice*, para. 7.) Moreover, although the *Adarand* decision<sup>9/</sup> prevented the Commission from granting license preferences based upon race and gender considerations, the hiring practices for entities such as TeleCorp/Tritel evidence a voluntary willingness to bring into the telecommunications revolution classes of persons not always provided with such opportunity. Both entities have substantial minority and female representation within their ranks. Nearly one-quarter of Tritel’s workforce is minority. With TeleCorp, that number approaches fifty percent! In addition to the significant minority representation discussed above, in both instances, women serve at the highest levels of the organization and have been involved with the companies in such capacities virtually since their inception. As such, TeleCorp/Tritel submits that at least these two Entrepreneurs do look the way Entrepreneurs – and all licensees – should look.

### **3. F Block Eligibility**

One of the open issues in the *Further Notice* was the issue of eligibility for the F Block spectrum. See *Further Notice*, para. 4. Apparently, the Commission was of the view that there may be certain equitable differences between the F Block spectrum and the C Block spectrum that could somehow warrant different treatment. Notwithstanding this, the core fact of the matter is that, as was

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<sup>9/</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (“*Adarand*”).

the case for C Block spectrum, the Commission entered into a covenant with Entrepreneurs wherein those Entrepreneurs were unequivocally advised that F Block spectrum would have restricted eligibility. These entities based business plans on those assurances from the Commission. Whereas argument could be made that the assurances fall short of contractual commitments, most certainly they were Commission pronouncements upon which applicants had both a right to rely and an obligation to adhere. In view of the Commission's repeated recent pronouncements of a need to maintain the integrity of its rules, the Commission cannot now legitimately abandon Entrepreneurs wholesale and open this F Block spectrum to the world at large. Were it to do so, its actions must be put in perspective: combined with what the Commission has proposed for the C Block reconfiguration, more than one-half of all unlicensed spectrum that was initially allocated solely for Entrepreneurs would now be available to the largest telecommunications companies in the country.

TeleCorp/Tritel is cognizant of the fact that the prices at the initial C Block auction and F Block auction differed significantly, and that argument has been made that this price differential somehow warrants different treatment at this point and time. Although the price differential was significant, the F Block prices were, on balance, at least as high as those in the A/B Block auction. Thus, the F Block auction acquisitions were most certainly not at a discounted value. More significantly, it would be inappropriate to overlook the "big picture" surrounding the F Block auction. At the time the auction was conducted, the C Block auction had barely finished. There were a handful of big winners at the C Block auction who, by virtue of their wins at that auction, were uniquely positioned to obtain financing to acquire the F Block spectrum. It is for that reason that those parties did obtain a considerable portion of the F Block spectrum. In fact, virtually all of

the F Block spectrum subject to re-auction was acquired by this handful of large C Block winners who subsequently defaulted on their obligations to the government. When viewed in this context, the meaningful differences between the F Block and C Block spectrum erode significantly, and the overriding consideration should be the need to maintain the integrity of the Commission's rules. Such consideration argues for maintaining existing eligibility limitations for F Block spectrum.

**B. The Commission Should Clarify, but not Modify, its Grandfathering Eligibility Rules.**

The Commission long ago recognized that the true victims of any impropriety in the initial C Block auctions were the other competing applicants who were effectively denied a meaningful opportunity to bid for the spectrum there at issue. It is in this context that the Commission carefully crafted protections for those entities. Those protections, which most certainly were not designed to last forever, provide grandfathering rights to those entities that participated in Auction No. 5 (the first C Block auction) or Auction No. 10 (the 1996 C Block re-auction). Specifically, any entity that participated in those auctions is eligible to participate in any re-auction to be conducted prior to March 23, 2001. The grandfathering is necessary in order to both maintain the integrity of the Commission's process and to ensure that Entrepreneurs who have abided by the Commission's rules permitting (and encouraging) normal growth are not now disadvantaged by such actions.

The Commission's tentative conclusion that, if two qualified Entrepreneurs merge, the resulting entity is also qualified, but if the merger involves an unqualified entity, there is no continuing qualification, adds some clarity to how the grandfathering rules are to be interpreted. Yet, the Commission has not addressed with clarity the sub-issue of how an "entity" is to be defined for purposes of grandfathering. Nowhere does the Commission explain that it is necessary for the exact

entity that previously applied to apply in the re-auction. Nor has the Commission set forth perimeters so that “substantially the same” entity could apply even if in the intervening five years its corporate form may have changed marginally. It is in this context that TeleCorp/Tritel urges the Commission to adopt a straightforward proposal whereby any entity that is sufficiently related to a participant in Auction No. 5 or Auction No. 10, such that an authorization could be transferred from the Auction No. 5 or Auction No. 10 participant to the re-auction candidate pursuant to the Commission’s rules governing *pro forma* changes, the new entity would be eligible for the re-auction on a grandfathering basis. That is to say, grandfathering would apply to an entity so long as control of the two entities remains in the same hands, and such that there has been no substantial change in other ownership.

Clarification as set forth above would serve the public interest for several reasons. First and foremost, it would avoid the need for prospective applicants to expend time and effort in updating and otherwise revitalizing entities that, for all practical purposes, were put on the shelf after the results of the C Block auctions became clear. Second, it would disadvantage no one in the sense that the small businesses will participate in the auction in any event, either through existing, more efficient corporate entities or, if absolutely necessary, through the previous auction participants. Lastly, the Commission and the public would benefit by virtue of their being enhanced participation in the upcoming auction.

TeleCorp/Tritel is cognizant of efforts by certain entities to effectively remove the grandfathering provision. The efforts are intriguing in the sense that they appear to be inspired not by a desire to impact meaningfully on eligibility itself (since at least certain of the parties proposing

limitations on grandfathering are not themselves eligible to participate as Entrepreneurs anyway), but rather in order to orchestrate against the continuation on any restriction on eligibility for C or F Block spectrum. The April 17, 2000 proposal from Verizon Wireless (“Verizon”) best illustrates this point.<sup>10/</sup> Specifically, at page 2, Verizon laments the Commission’s existing rules with respect to providing grandfathering rights to entities with assets above Entrepreneurial thresholds, and suggests that grandfathering should be extended only to those entities that currently meet eligibility requirements. On its face, Verizon appears to be telling the Commission that grandfathering should extend only to those parties who, by virtue of continuing to be eligible outside of the grandfathering context, have no need for grandfathering benefits. Later, Verizon urges that grandfathering extend only to entities that returned spectrum pursuant to the FCC’s restructuring options. Verizon, p. 9. That proposal would limit eligibility for certain of the most financially strong prospective re-auction applicants. It would also eliminate, by definition, those entities that elected to discontinue entirely any participation in the C Block auction when prices rose to unacceptable levels, and thus had no spectrum to return to the Commission.

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<sup>10/</sup> The Verizon submission is particularly intriguing. Although styled as a “Petition for Clarification or Reconsideration”, what the petition asks in reality is that a clear and unmistakable rule be gutted. Asserting that somehow the grandfathering relief provided by the Commission should be limited to only those licensees who return spectrum – and thus in all likelihood are less likely to apply for spectrum now – Verizon completely ignores the fundamental equities that underlaid the Commission’s rulemaking. It is also critical to appreciate that the Verizon petition is untimely filed and that it is effectively is a petition for reconsideration of a Commission decision rendered months earlier. If the Commission wants to consider the Verizon proposal, it needs to explain why the untimely filing should not constitute a bar. It also needs to appreciate that consideration of the Verizon petition here will make it impossible for the Commission to ignore similarly untimely petitions in other proceedings.

**C. The Commission Should Not Modify its Entrepreneurial Requirements that Apply to Licensees.**

TeleCorp/Tritel understands that proposals have been presented urging that the Commission permit Entrepreneurs to evade its rules associated with such status, not at the end of the currently prescribed five-year period, but based upon completion of initial construction of their licenses. TeleCorp/Tritel does not seek such relief, and remains committed to comply with the covenant into which it entered with the government when it received its licenses. Notwithstanding this, TeleCorp/Tritel has no interest in impeding other Entrepreneurs who may elect to change course at this time. Rather, TeleCorp/Tritel seeks to avoid any collateral rush by non-Entrepreneurs to instigate a rash of license transfers. At the same time, TeleCorp/Tritel submits that there is no need for the Commission to promulgate special rules to accommodate such a request (or possibly requests). Rather, the Commission's existing waiver rules appear more than adequate to provide the relief sought if there truly are public interest reasons supporting such a change.<sup>11/</sup>

In order to obviate confusion with respect to what needs to be demonstrated in order to obtain relief from Entrepreneurial rules, TeleCorp/Tritel suggests that the Commission promulgate guidelines on this matter. Those guidelines, which can be straightforward, should include the following: (a) requests for relief from Entrepreneurial restrictions should be made not by the applicant as a whole, but rather by the qualified persons in the control group of the applicant; and (b) if licensees have met their five-year build out requirement, there should be a presumption in favor of grant of a waiver.

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<sup>11/</sup> TeleCorp/Tritel takes this position vis-a-vis spectrum for which eligibility restrictions remain in place. For all other spectrum, TeleCorp/Tritel takes no position.

As the Commission is well aware, the Entrepreneurial rules were designed in large part to assure that the benefits associated with licensing to Entrepreneurs are enjoyed by those who qualify as Entrepreneurs and are not grabbed entirely by non-qualified partners of Entrepreneurs, which partners were permitted to participate only in order to enhance the capabilities of Entrepreneurs themselves. It is in this context that the Entrepreneurs, and not the larger controlling parties, should be the ones who determine whether or not a waiver is appropriate. Only in this way can the parties whom rules were designed to protect, and whom the Commission has specifically mandated to control the applicants, be sufficiently protected.

**D. For Spectrum No Longer Reserved for Entrepreneurs, Bidding Credits Must be Increased Substantially.**

Inquiry was also invited with respect to whether the Commission should change the level of bidding credits available to Entrepreneurs, both for spectrum reserved for Entrepreneurs and for spectrum available for all parties. *Further Notice*, paras. 39-42. With respect to bidding credits for spectrum open to bid by all parties, TeleCorp/Tritel submits that, should this spectrum be removed from that which has been reserved solely for Entrepreneurs, and if Entrepreneurs are intended to have any genuine opportunity to participate in this spectrum, a substantial increase in bidding credits is necessary. TeleCorp/Tritel submits that the Commission was correct in 1994 when it explained that bidding credits in the range of sixty to seventy percent would be necessary in the event that the spectrum at issue is open to bidding by all parties.<sup>12/</sup> At the very least, an increase up to the forty percent level contemplated in the in *Further Notice* would appear to be necessary. In contrast, with

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<sup>12/</sup> *Fifth Report and Order*, pp. 5532, 5675.

respect to spectrum that is reserved for Entrepreneurs, there would appear to be no utility in maintaining bidding credits.

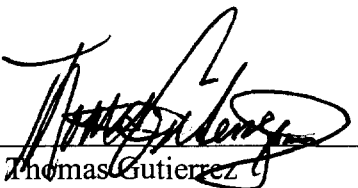
### **III. Conclusion**

There is no need for the Commission to make any changes in its rules. Should it promulgate any changes, however, they should be minimal and should be designed to protect Entrepreneurs as set forth herein. Only in this manner can the Commission maintain the integrity of its rules.

Respectfully submitted,

TELECORP PCS, INC.

TRITEL COMMUNICATIONS, INC.

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June 22, 2000



**CERTIFICATE OF SERVICE**

I, Jennifer McCord, do hereby certify that on this 22nd day of June, 2000, I caused copies of the foregoing "*Comments of TeleCorp PCS, Inc. and Tritel Communications, Inc.*" to be served via hand delivery upon the following:

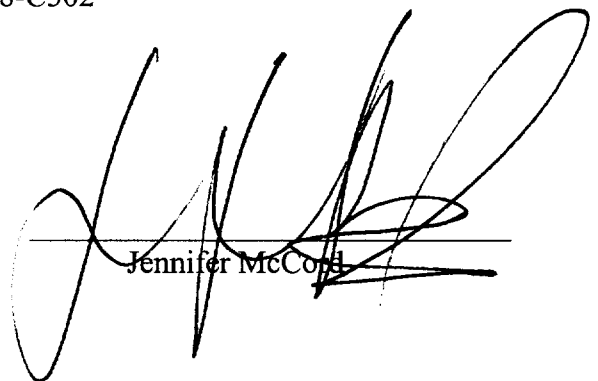
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